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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/505,458	02/11/2000	Michael R. Rosen	61020-A/HOW/PJP	6325

7590 01/09/2004

Cooper & Dunham LLP  
1185 Avenue of the Americas  
New York, NY 10036

EXAMINER

OROPEZA, FRANCES P

ART UNIT	PAPER NUMBER
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3762

DATE MAILED: 01/09/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action**

Application No.

09/505,458

Applicant(s)

ROSEN ET AL.

Examiner

Frances P. Oropeza

Art Unit

3762

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 22 December 2003 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE. Therefore, further action by the applicant is required to avoid abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

**PERIOD FOR REPLY** [check either a) or b)]

- a) ☐ The period for reply expires \_\_\_\_\_ months from the mailing date of the final rejection.
- b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection. **ONLY CHECK THIS BOX WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).**

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1. ☐ A Notice of Appeal was filed on \_\_\_\_\_. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.
2. ☐ The proposed amendment(s) will not be entered because:
- (a) ☐ they raise new issues that would require further consideration and/or search (see NOTE below);
  - (b) ☐ they raise the issue of new matter (see Note below);
  - (c) ☐ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
  - (d) ☐ they present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_.

3. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.
4. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
5. ☒ The a) ☐ affidavit, b) ☐ exhibit, or c) ☒ request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Continuation Sheet.
6. ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.
7. ☒ For purposes of Appeal, the proposed amendment(s) a) ☐ will not be entered or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: \_\_\_\_\_.

Claim(s) objected to: \_\_\_\_\_.

Claim(s) rejected: 1-60.

Claim(s) withdrawn from consideration: \_\_\_\_\_.

8. ☐ The drawing correction filed on \_\_\_\_\_ is a) ☐ approved or b) ☐ disapproved by the Examiner.
9. ☐ Note the attached Information Disclosure Statement(s) (PTO-1449) Paper No(s). \_\_\_\_\_.
10. ☐ Other: \_\_\_\_\_

Frances P. Oropeza  
Art Unit 3762

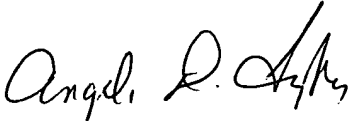
1/7/04

Continuation of 5. does NOT place the application in condition for allowance because:

The arguments of the Applicant's Agent and the declaration by the Applicant submitted under 37 C.F.R. 1.132 have been fully considered. Since the Agent's arguments and the declaration appear to mirror the same points, the arguments by the Applicant and Applicant's Agent will only be addressed once in the subsequent comments.

The declaration under 37 CFR 1.132 filed 12/22/03 is insufficient to overcome the rejection of claims 1-60 based upon the references applied under 35 U.S.C 102(e) and 35 U.S.C. 103(a) as set forth in the last office action because the comments by the Applicant do not appear to have probative value, as the comments are not directed to evidence of unexpected results, commercial success, solution of long-felt but unsolved needs, inoperability of the prior art, invention before the date of the reference, and allegations that the author(s) of the prior art derived the disclosed subject matter from the Applicant. It appears the Applicant's comments are opinion evidence related to the scope of impact of the Ben-Haim et al. device on the ion channels, gap junctions and refractory periods. In the declaration, the Applicant states the Ben-Haim et al. device "would not necessarily induce ion channel remodeling or remodel gap junctions", "would not necessarily result in inducing ion channel remodeling or remodeling of gap junctions", and "would not necessarily alter the relative refractory period". These comments appear to acknowledge the impact of the Ben-Haim et al. invention is unknown, and appear to acknowledge Ben-Haim et al., who applies non-excitatory electrical field that modifies the plateau currents and the force of contraction of the heart (applies an electrical stimulus to the heart that does excite it, resulting in altered activation), also does, at least in certain situations, remodel the gap junctions, alter the effective refractory periods, and induce ion channel remodeling with the electrical field, hence the rejection of record stands.

JPO  
1/7/04

  
ANGELA D. SYKES  
SUPERVISORY PATENT EXAMINER  
TECHNOLOGY CENTER 3700